Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

**IN THE MATTER OF THE *SECURITIES ACT*,**
**R.S.O. 1990, c. S.5, AS AMENDED**

**AND**

**IN THE MATTER OF**
**MONCASA CAPITAL CORPORATION and**
**JOHN FREDERICK COLLINS**

# REASONS AND DECISION ON SANCTIONS AND COSTS

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| **Hearing:** | July 11, 2013 | |
| **Decision:** | December 20, 2013 | |
| **Panel:** | Edward P. Kerwin | -Commissioner |
| **Appearances:** | Tamara Center | -For the Ontario Securities Commission |
| | | -No one appeared for the respondents Moncasa Capital Corporation and John Frederick Collins |

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## REASONS AND DECISION ON SANCTIONS AND COSTS

## I. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs against John Frederick Collins ("Collins") and Moncasa Capital Corporation ("Moncasa") (collectively, the "Respondents").

[2] The hearing on the merits in this matter took place on January 21, 22, 23, 24 and March 13, 2013. None of the Respondents appeared or participated in the hearing on the merits.

[3] The decision on the merits was issued on May 17, 2013 (*Re Moncasa Capital Corporation et al* (2013), 36 O.S.C.B. 5320 (the "Merits Decision")).

[4] Following the release of the Merits Decision, a hearing was held on July 11, 2013, to consider sanctions and costs (the "Sanctions and Costs Hearing"). Staff of the Commission ("Staff") appeared at the Sanctions and Costs Hearing.

[5] None of the Respondents appeared or participated in the Sanctions and Costs Hearing. Staff informed the Commission that the Respondents were served with the Order setting down the Sanctions and Costs Hearing. In the circumstances, I am satisfied that notice of the Sanctions and Costs Hearing was served on the Respondents, and that I am entitled to proceed in their absence in accordance with subsection 7(1) of the SPPA and Rule 7.1 of the Commission's Rules. I also note that the Respondents did not appear or participate in the hearing on the merits in this matter (see Merits Decision, *supra* at paras. 13 to 20).

[6] Staff provided written submissions dated June 7, 2013, along with a Book of Authorities, and Staff's Sanctions Compendium, which includes a copy of the Merits Decision, Total Bill of Costs, Bill of Costs sought by Staff, an Affidavit of Yolanda Leung, sworn June 5, 2013 with appended dockets and copies of invoices for disbursements. The Respondents did not file any materials for the Sanctions and Costs Hearing.

[7] These are my Reasons and Decision as to the appropriate sanctions and costs to order against the Respondents.

## II. The Merits Decision

[8] The Merits Decision addressed the following issues:

1. Did the Respondents trade in securities without registration in breach of subsection 25(1)(a) of the Act (for the time period from April 1, 2008 to September 27, 2009) and subsection 25(1) of the Act (for the time period

from September 28, 2009 to May 16, 2011) and contrary to the public interest?

2. Did the Respondents engage in a distribution of securities without a prospectus in breach of subsection 53(1) of the Act and contrary to the public interest?

3. Did the Respondents engage in fraud in breach of subsection 126.1(b) of the Act and contrary to the public interest?

4. Did Collins make false and/or misleading statements to the Commission in breach of subsection 122(1)(a) of the Act and contrary to the public interest?

5. Did Collins authorize, permit or acquiesce in breaches of subsections 25(1)(a) (during the time period from April 1, 2008 to September 27, 2009), 25(1) (during the time period from September 28, 2009 to May 16, 2011), 53(1) and 126.1(b) of the Act by Moncasa, such that he is deemed to also have not complied with Ontario securities law pursuant to section 129.2 of the Act?

(Merits Decision, *supra* at para. 21)

[9] Upon reviewing all the evidence, the applicable law and the submissions made, the Panel concluded in the Merits Decision that:

(a) Moncasa and Collins breached subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011;

(b) Moncasa and Collins breached subsection 53(1) of the Act;

(c) there were no exemptions available to either Moncasa or Collins;

(e) Moncasa and Collins breached section 126.1(b) of the Act;

(f) Collins breached subsection 122(1)(a) of the Act;

(g) pursuant to section 129.2 of the Act, Collins is deemed to have not complied with Ontario securities law, having authorized or permitted Moncasa's breaches of subsections 25(1)(a) during the time period from April 1, 2008 to September 27, 2009 and 25(1) during the time period from September 28, 2009 to May 16, 2011, 53(1) and 126.1(b) of the Act; and

(h) Moncasa and Collins acted contrary to the public interest.

(Merits Decision, *supra* at para. 174)

[10] It is that conduct and those findings and conclusions that I must consider when determining the appropriate sanctions to impose in this matter.

## III. Sanctions and Costs Requested by Staff

[11] Staff has requested that the following order be made against the Respondents:

(a) that trading in any securities by the Respondents cease permanently, pursuant to paragraph 2 of section 127(1) of the Act;

(b) that acquisition of any securities by the Respondents is prohibited, permanently, pursuant to paragraph 2.1 of section 127(1) of the Act;

(c) that any exemptions contained in Ontario securities law do not apply to the Respondents permanently, pursuant to paragraph 3 of section 127(1) of the Act;

(d) that the Respondents be reprimanded, pursuant to paragraph 6 of section 127(1) of the Act;

(e) that Collins resign one or more positions that he holds as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 7, 8.1 and 8.3 of section 127(1) of the Act;

(f) that Collins be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 8, 8.2 and 8.4 of section 127(1) of the Act;

(g) the Respondents be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter, pursuant to paragraph 8.5 of section 127(1) of the Act;

(h) that Respondents pay an administrative penalty of $400,000 for failure to comply with Ontario securities law, pursuant to paragraph 9 of section 127(1) of the Act;

(i) that Respondents disgorge to the Commission the sum of $1,231,800 obtained as a result of non-compliance with Ontario securities law, pursuant to paragraph 10 of section 127(1) of the Act;

(j) the Respondents be ordered to pay a portion of the costs of the Commission investigation and the hearing in the amount of $280,721.02, pursuant to section 127.1 of the Act;

(k) the Respondents be permanently prohibited to call at a residence or telephone from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives, pursuant to section 37 of the Act; and

(l) such other order as the Commission may deem appropriate.

[12] Staff also requested that any amounts ordered for disgorgement and administrative penalties be allocated to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[13] In Staff's submission, the sanctions requested are appropriate in light of the Respondents' conduct and take into account the multiple breaches of the Act that occurred. Staff submits that there is a need to send a strong message to the Respondents and the public at large. Staff further submits that orders removing the Respondents permanently from the capital markets, significant administrative penalties and disgorgement of all funds obtained from the fraudulent investment scheme are proportionate to the Respondents' misconduct, and will send a message to the Respondents and to like-minded individuals that involvement in these types of fraudulent schemes will result in severe sanctions. In addition, Staff submits that the amount of costs claimed is reasonable and appropriate in the circumstances.

## IV. The Law on Sanctions

[14] Pursuant to section 1.1 of the Act, the Commission has the mandate to: (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets. As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("*Asbestos*"), the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets (at para. 42). Specifically:

> … the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for

> the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
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> …
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> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. … In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation.
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> (*Asbestos, supra* at paras. 43 and 45 [emphasis added])

[15] In determining the appropriate sanctions to order in this matter, it is important to keep in mind the Commission's preventive and protective mandate set out in section 1.1 of the Act, and consider the specific circumstances in this case and ensure that the sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134).

[16] The case law sets out the following list of non-exhaustive factors that are important to consider when imposing sanctions:

(a) the seriousness of the allegations proved;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the need to deter a respondent, and other like-minded individuals, from engaging in similar abuses of the capital markets in the future;

(f) whether the violations are isolated or recurrent;

(g) the size of any profit gained or loss avoided from the illegal conduct;

(h) any mitigating factors, including the remorse of the respondent;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) in light of the reputation and prestige of the respondent, whether a particular sanction will have an impact on the respondent and be effective;

(l) the size of any financial sanctions or voluntary payment when considering other factors.

(*Re M.C.J.C. Holdings*, *supra* at 1136 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746)

[17] The applicability and importance of each factor will vary according to the facts and circumstances of each case.

[18] Deterrence is another important factor for the Commission to consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*"), the Supreme Court of Canada explained that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (at para. 60). Further, the Supreme Court emphasized that deterrence may be specific to the respondent or general to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway*, *supra* at para. 52)

[19] As stated above, the sanctions imposed must be protective and preventive. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As articulated by the Commission in *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600:

> … the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a

person's future conduct might reasonably be expected to be; we are not prescient, after all.

(*Mithras*, *supra* at 1610 and 1611)

## V. Appropriate Sanctions in this Case

### 1. Specific Sanctioning Factors Applicable in this Matter

[20] Overall, the sanctions imposed must protect investors and the Ontario capital markets by barring or restricting the respondents from participating in those markets in the future.

[21] In considering the sanctioning factors set out above in the case law, the following specific factors and circumstances are relevant in this matter:

(a) The seriousness of the allegations: The Respondents breached a number of key provisions of the Act. Individually and collectively, these are serious breaches.

The Respondents engaged in unregistered trading and an illegal distribution of securities without a prospectus (Merits Decision, *supra* at paras. 78 and 85). Solicitations and sales of securities were made without regard to registration, prospectus and disclosure requirements of the Act. This damages the integrity of the capital markets. The Respondents' conduct undermined public confidence in the capital markets and shows blatant disregard for the rule of law and Ontario's securities regime.

It was also found that the Respondents engaged in fraudulent conduct affecting 57 individuals who invested in Moncasa. As stated in paragraph 119 of the Merits Decision.

> Investors relied on the false and fabricated information about Moncasa and its business activities when deciding whether to invest in the company. […] the following facts are indicators that fraud was taking place: existence of false information in corporate documents, press releases and marketing and promotional materials; lack of financial documentation and failure to provide company and financial information to investors; the use of aliases; and the use of high pressure sales tactics to coerce investors to invest and to increase their investment. These fraudulent acts caused deprivation to investors. Through the investment scheme, Moncasa raised a total of approximately $1,200,000 from investors. I note that these investors lost their funds and were not paid back.

Further, as stated in paragraph 146 of the Merits Decision:

> Collins deceived investors by misrepresenting his qualifications, expertise, and experience and Moncasa's business activities and use of funds. Collins also misled investors by representing to them that Moncasa operated a successful and growing business. Investors were deprived of their funds as a result of false and misleading statements. Furthermore, Collins misappropriated investor funds by spending at least $327,773.52 of those funds on personal expenses, and with the exception of the USD $69,052.20 payment for the right to use a single property in the Dominican Republic for four one-week periods annually, the remaining investor funds were used to pay salespeople and to otherwise further the activities of the Moncasa boiler room operation.

The fraudulent conduct of the Respondents caused significant harm to investors and deprived investors of their funds. The scope and magnitude of the fraudulent conduct is an important consideration when determining appropriate sanctions.

The Commission has previously held that fraud is "one of the most egregious securities regulatory violations", both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system." (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 at para. 214)

In addition, Collins misled Commission Registration Staff and Commission Enforcement Staff (Merits Decision, *supra* at paras. 150 to 163). Specifically, misleading statements were made about: (1) the ongoing sales of Moncasa shares, (2) the role of Moncasa salespeople, (3) commissions paid to Moncasa salespeople, (4) Collin's relationship with Abel Da Silva, and (5) Moncasa's previous relationships with investors. Misleading the Commission is a serious violation of the Act. In particular, the Commission has held that the act of misleading Staff is a particularly egregious violation of the public interest (*Re Koonar* (2002), 25 O.S.C.B. 2691 at 2692).

(b) The Respondents' experience in the marketplace: The Commission has held that a breach of Ontario securities law by a registrant is serious because the offender is aware of the importance of securities law for the capital markets (*Re Rowan* (2010), 33 O.S.C.B. 91 at para. 145).

Neither of the Respondents was registered with the Commission when investors were sold Moncasa securities, however, Collins was previously registered as a salesperson with Marchment & MacKay Limited from February 2, 1994 to November 21, 1997, and with C.J. Elbourne Securities

Inc. from November 28, 1997 to June 30, 2000. He also made further unsuccessful attempts to register in 2000, 2007 and 2008 (Merits Decision, *supra* at paras. 47 to 51).

As a former registrant, Collins had a higher level of awareness of securities law requirements and the importance of those requirements to the capital markets. This is an important consideration to take into account when imposing sanctions on Collins.

(c) The Respondents' activity in the marketplace: The Commission has considered a number of factors in assessing the scale of a respondent's misconduct and their activity in the marketplace, including the number of investors affected, the amount of investor funds raised, the amount lost by investors, whether the misconduct was repeated, and the period of time over which it occurred. In this case, the unlawful conduct was carried out across Canada, over a period of three years, and resulted in the loss of $1,231,800 from 57 investors. The Respondents' conduct also demonstrates their ability to plan and execute a securities fraud scheme using sophisticated marketing tools.

(d) Whether there has been a recognition of the seriousness of the improprieties: The Respondents did not attend the merits hearing or sanctions hearing. In addition, the actions of the Respondents during the investigation stage provide no basis to conclude that they have recognized the seriousness of their improprieties or that they have any remorse for the consequences of their conduct. In particular, Collins misled Staff throughout the investigation to try to conceal his inappropriate actions. Specifically, the Panel found at paragraphs 150, 154, 157, 161 and 163 of the Merits Decision that Collins made misleading statements to Staff regarding ongoing sales of Moncasa's shares, the role of Moncasa's salespeople, commissions paid to Moncasa salespeople, Collins' relationship with Abel Da Silva, and Moncasa's previous relationship with investors. Instead of recognizing the seriousness of these improprieties, Collins misled Staff and did not take responsibility for his and Moncasa's actions.

(e) The size of any profit made from the illegal conduct: Of the $1,231,800 raised from investors, most of the investor funds were used "to further the activities of the Moncasa boiler room operation" (Merits Decision, *supra* at para. 135). The Panel also found that Collins misappropriated $327,773.52 of investor funds, which represented a misappropriation for personal use of 26.6% of the $1,231,800 raised from investors.

(f) Deterrence: As set out above in paragraph 18 of this decision, deterrence is an important factor to consider. In this case, specific deterrence for Collins is an important factor to consider because, as a former registrant,

Collins had a higher level of awareness of securities law requirements and the importance of those requirements to the capital markets, yet he still engaged in conduct which breached securities law.

(g) The restraint any sanctions may have on the ability of a Respondent to participate without check in the capital markets: As stated above, the Respondents engaged in a fraudulent scheme and fraud has been found to be one of the most egregious violations of securities law. The Respondents' conduct has been so harmful that they should be prevented from participating in the capital markets in any capacity. As confirmed by the Divisional Court "[p]articipation in the capital markets is a privilege, not a right" (*Erikson v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1622 (Div. Ct.) at paras. 55 and 56). Such a right should not be extended to those who commit fraud.

## 2. Trading and Other Prohibitions

***Permanent Bans***

[22] Staff requested permanent trading and registration bans be imposed on the Respondents and permanent director and officer bans be imposed on Collins. Staff submits that permanent bans are appropriate when the conduct at issue involves fraud. In addition, Staff submits that carve-out exceptions for personal trading in registered accounts are not appropriate when fraudulent conduct is engaged in because the Respondents' fraudulent conduct demonstrates that they cannot be trusted to participate in the capital markets in even a limited capacity.

[23] As set out in paragraphs 144 to 146 of the Merits Decision, the Respondents engaged in a fraudulent scheme. As discussed above at paragraph 21 of these reasons, this is very serious misconduct.

[24] In *Mithras*, the Commission explained that the removal of individuals from the capital markets is an effective mechanism for protecting the public. Methods include banning persons from trading, and from becoming officers, directors and registrants. This prevents such persons from participating in the capital markets through positions of control or direction within a company and from interacting with investors.

[25] In past cases, the Commission has issued permanent bans in "boiler room" schemes where many investors were harmed and large sums of money were raised by respondents (see for example *Re Limelight Entertainment Inc.,* (2008), 31 O.S.C.B. 12030 ("*Limelight*"), *Re Al-Tar Energy Corp.* (2011), 34 O.S.C.B. 447 ("*Al-Tar*") and *Re Allen et al* (2006), 29 O.S.C.B. 3944).

[26] Taking all of this into consideration, I find that the Respondents' conduct has been so harmful that they should be prevented from participating in the capital markets in any capacity. It is therefore appropriate to order that the Respondents be permanently banned from trading or acquiring securities and permanently banned from becoming or

acting as a registrant, as an investment fund manager or as a promoter. In addition, Collins is also permanently banned from becoming or acting as a director or officer of any issuer, registrant or investment fund manager. The imposition of such permanent bans will ensure that Collins will not be put in a position of direction or trust with any issuer or with investors. This is important because the misconduct in this matter took place when Collins created Moncasa and used the corporate entity as part of a scheme to defraud the public.

[27] Further, exemptions in Ontario securities law shall not apply to the Respondents permanently.

[28] The combined sanctions of permanent trading bans and a permanent prohibition of acting as a director or officer of any issuer, registrant or investment fund manager and permanent ban from acting as a registrant, as an investment fund manager or as a promoter, are together intended to provide general and specific deterrence to help ensure that similar conduct does not take place in the future.

***Reprimand***

[29] As set out in paragraph 174 of the Merits Decision, the Respondents engaged in unregistered trading, an illegal distribution of securities, fraud and Collins misled the Commission and was found to have not complied with Ontario securities law, having authorized or permitted Moncasa's breaches of the Act. This conduct was contrary to the public interest.

[30] I find it appropriate that the Respondents be reprimanded. The reprimand is intended to provide strong censure of the Respondents' misconduct and to impress on the public the importance of complying with securities law.

[31] The Respondents are hereby reprimanded for the conduct set out in the Merits Decision.

**3. Administrative Penalty**

[32] Paragraph 9 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to "pay an administrative penalty of not more than $1 million for each failure to comply".

[33] The Commission has held that an administrative penalty should be of a magnitude sufficient to ensure effective specific and general deterrence. The goals of specific and general deterrence are most effectively met by administrative penalties that are proportional to each respondent's culpability in the matter. Important considerations in determining an administrative penalty may include: the scope and seriousness of a respondent's misconduct; whether there were multiple and/or repeated breaches of the Act; whether the respondent realized any profit as a result of his or her misconduct; the amount of money raised from investors; the harm caused to investors; and the level of

administrative penalties imposed in other cases (*Re Goldpoint Resources Corporation et al* (2013), 36 O.S.C.B. 1464 at para. 75; and *Limelight, supra* at paras. 71 and 78).

[34] Staff seeks an administrative penalty in the amount of $400,000 against the Respondents on a joint and several basis. In cases involving the illegal distribution of securities, unregistered trading, misrepresentations, and particularly in cases involving fraudulent conduct, the Commission has awarded significant administrative penalties in order to have the intended deterrent effect.

[35] At the same time, however, in imposing an administrative penalty, the Commission must consider the level of administrative penalties imposed in other similar cases where comparable harm was done to investors (*Limelight, supra* at para. 71). I have considered the cases referred to me by Staff, including *Al-Tar, supra*, *Re Merax Resource Management Ltd. et al* (2012), 35 O.S.C.B. 11545, *Re Richvale Resources Corp.* (2012), 35 O.S.C.B. 10699 and *Re Empire Consulting Inc.* (2013), 36 O.S.C.B. 2327. I find the amount proposed by Staff ($400,000 to be paid joint and several by Moncasa and Collins) to be consistent with the orders imposed in other Commission cases dealing with similar misconduct and proportional to the circumstances and conduct of each Respondent.

[36] Considering the amount ordered to be disgorged (discussed below) together with the totality of the sanctions imposed including permanent bans, and balancing the magnitude of the harm committed by the Respondents in the amount of $1,231,800 raised from 57 investors, the quantum of $400,000 (joint and several against Collins and Moncasa) will serve the necessary specific and general deterrent purposes.

[37] Therefore, the Respondents shall pay an administrative penalty in the amount of $400,000 on a joint and several basis and this amount shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) or (ii) of the Act.

**4. Disgorgement**

[38] Paragraph 10 of subsection 127(1) of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance.

[39] The Commission has previously held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity". As explained in *Limelight, supra* at paragraph 49:

> We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the

> "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.

[40] The *Limelight* case sets out a non-exhaustive list of disgorgement factors to consider at paragraph 52, which include:

(a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) the deterrent effect of a disgorgement order on the respondents and other market participants.

[41] The *Limelight* case also states that Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty (*Limelight*, *supra* at para. 53).

[42] Staff takes the position that the Respondents should be ordered to disgorge $1,231,800 (the entire amount raised by investors), on a joint and several basis.

[43] Applying the *Limelight* factors set out above, I find that it is appropriate to order that the Respondents disgorge $1,231,800 on a joint and several basis, based on consideration of the following factors:

(a) the entire amount of investor funds raised was obtained as a result of the Respondents' illegal distribution of securities and fraudulent conduct;

(b) the Respondents' misconduct was very serious and investors were seriously harmed by the fraud perpetrated by the Respondents;

(c) the amount obtained by the Respondents has been precisely ascertained, $1,231,800 represents the total amount raised as a result of Moncasa's illegal investment solicitation activities from 57 investors (Merits Decision, *supra* at para. 57);

(d) it does not appear likely that investors will be able to recoup any of their losses and as set out in paragraph 142 of the Merits Decision, Moncasa raised "… $1,231,800 from investors, none of which has been returned" to investors; and

(e) a disgorgement order for the entire amount raised by the Respondents would have a significant specific and general deterrent effect.

[44] It is also appropriate that the entire amount of $1,231,800 be disgorged on a joint and several basis since Collins effectively controlled Moncasa and used the company as a vehicle to perpetrate the illegal distribution and fraud. Collins was the sole director, officer, majority shareholder of Moncasa, and its directing mind. Effectively Collins and Moncasa acted as one and the same and as a result, together, they should disgorge the investor funds obtained on a joint and several basis.

[45] Therefore, the Respondents shall disgorge, on a joint and several basis the amount of $1,231,800 and this amount shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) or (ii) of the Act.

**5. Section 37 of the Act**

[46] Staff has requested pursuant to subsection 37(1) of the Act that the Respondents be permanently prohibited from calling at a residence or telephoning from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives.

[47] Subsection 37(1) of the Act, as amended on December 8, 2010, states as follows:

> **Order prohibiting calls to residences**
>
> **37.** (1) The Commission may by order suspend, cancel, restrict or impose terms and conditions on the right of any person or company named or described in the order to call at a residence or telephone from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives.

[48] Prior to December 8, 2010, subsection 37(1) was substantially identical except it did not refer to derivatives.

[49] An order prohibiting calls to residences is a forward-looking order to protect the public and is appropriate when the conduct at issue involves a scheme whereby investors are cold-called and solicited by telephone.

[50] In the Merits Decision, the Panel found that investors were cold-called by Collins and Moncasa's salespeople (Merits Decision, *supra* at paras. 71, 72 and 162). Specifically, Collins and Moncasa's salespersons systematically phoned individuals whose names were obtained from "a list of 5,000 names that the Respondents had purchased from Dunhill, which is a company that compiles lists with the contact information of potential investors" (Merits Decision, *supra* at para. 54).

[51] This conduct involved a systematic process of solicitation and sale of Moncasa securities by telephone, and it is therefore appropriate to make an order under subsection 37(1) of the Act to prevent the Respondents permanently from calling at a residence or telephoning from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives.

## VI. Costs

[52] Pursuant to section 127.1 of the Act, the Commission has the discretion to order a person or company to pay the costs of the investigation and hearing if the Commission is satisfied that the person or company has not complied with the Act or has not acted in the public interest. Rule 18.2 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 sets out a number of factors a Panel may consider in exercising its discretion to order costs.

[53] Staff requested, pursuant to subsection 127.1 of the Act, that the Respondents be ordered to pay, jointly and severally, $280,721.02 to cover the costs related to the investigation and merits hearing ($268,905.00) and disbursements ($11,816.02) in this matter. Staff calculates their costs as follows:

| **Staff** | **Total Hours** | **Rate** | **Total Costs** |
|---|---|---|---|
| Craig Gallacher (Investigation Staff) | 792 | $185 | $146,520.00 |
| Tamara Center (Senior Litigation Staff) | 597 | $205 | $122,385.00 |
| **TOTAL** | **1389** | | **$268,905.00** |
| | | | |
| **Disbursements** | | | **$11,816.02** |
| | | | |
| **Total Costs** | | | **$280,721.02** |

[54] In support of this request, Staff provided a Sanctions Compendium which included Staff's Bill of Costs, an affidavit of Yolanda Leung dated June 5, 2013, detailed dockets (as required by Rule 18.1(2)(b) of the Commission's *Rules of* Procedure) which included timesheets with dates, numbers of hours worked and details of the tasks performed by each of the individuals listed in the bill of costs) and detailed invoices for disbursements.

[55] Staff explained that its costs were calculated in accordance with Staff's schedule of hourly rates for various members of Staff of the Enforcement Branch ($205 an hour for Litigation Staff and $185 for Investigation Staff). Staff submits that they have taken a conservative approach to calculating costs. The Bill of Costs reflects the fact that numerous other individuals assisted with the assessment, investigation and litigation of this matter. In fact, total Staff costs for this matter amounted to $500,377.27, and Staff took a conservative approach and only requested costs for a total amount of $280,721.02 for the following two individuals from Staff for their work during the investigation and merits hearing stage: Craig Gallacher (Investigation Staff) and Tamara Center (Senior Litigation Staff). Staff did not seek costs for time spent on settlement negotiations, time spent by students-at-law, law clerks and assistants, time spent on preparing for the sanctions hearing and time spent by other accountants and litigation counsel.

[56] During the hearing, Staff explained that high costs in this matter are due to complexities that arose during the investigation stage, which were a result of Collins providing the Commission with misleading information that prolonged the investigation process. According to Staff, there are no facts that would mitigate the costs in this matter.

[57] In the circumstances, I find that it is appropriate to order that the Respondents pay costs, jointly and severally, in the amount of $280,721.02. I have reviewed Staff's documents in support of their costs request and I find that the costs requested are reasonable. There are no factors present that would mitigate costs in this matter for the Respondents.

## VII. Decision on Sanctions and Costs

[58] I consider that it is important in this case to: (1) impose sanctions that reflect the seriousness of the securities law violations that occurred in this matter; and (2) impose sanctions that not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[59] I will issue a separate order giving effect to our decision on sanctions and costs, as follows:

(a) trading in any securities by the Respondents cease permanently, pursuant to paragraph 2 of section 127(1) of the Act;

(b) the acquisition of any securities by the Respondents is prohibited permanently, pursuant to paragraph 2.1 of section 127(1) of the Act;

(c) any exemptions contained in Ontario securities law do not apply to the Respondents permanently, pursuant to paragraph 3 of section 127(1) of the Act;

(d) the Respondents be reprimanded, pursuant to paragraph 6 of section 127(1) of the Act;

(e) Collins resign all positions that he holds as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 7, 8.1 and 8.3 of section 127(1) of the Act;

(f) Collins is prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 8, 8.2 and 8.4 of section 127(1) of the Act;

(g) the Respondents are prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter, pursuant to paragraph 8.5 of section 127(1) of the Act;

(h) the Respondents are required to pay on a joint and several basis an administrative penalty in the amount of $400,000 for failure to comply with Ontario securities law, pursuant to paragraph 9 of section 127(1) of the Act, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(i) the Respondents are required to disgorge on a joint and several basis to the Commission the amount of $1,231,800 obtained as a result of non-compliance with Ontario securities law, pursuant to paragraph 10 of section 127(1) of the Act, which amount is designated for allocation or use by the Commission pursuant to subsections 3.4(2)(b)(i) or (ii) of the Act;

(j) the Respondents pay on a joint and several basis costs in the amount of $280,721.02, that were incurred by or on behalf of the Commission in respect of the investigation and the hearing of this matter, pursuant to section 127.1 of the Act; and

(k) the Respondents are permanently prohibited to call at a residence or telephone from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives, pursuant to section 37 of the Act.

Dated at Toronto this 20th day of December 2013.

"*Edward P. Kerwin"*

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Edward P. Kerwin